Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-907

BRUCE K. JORDAN, PETITIONER,

versus

U. S. NATURAL RESOURCES, INC.,
IRVINGTON MOORE DIVISION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provision Involved	2
Statement	3
Reasons for Granting the Writ	4
(1) The decision herein is not in accord with the applicable decisions of this Court	4
(2) Existing conflict among the circuits and also among the courts within specific circuits	4
(3) The action of the Court below, in affirming the findings and judgment of the District Court, is inconsistent with applicable principles of federal appellate review and contrary to the applicable state law involving an important question affecting the loss of human life which otherwise may be saved	5
Conclusion	9
Appendix	11
Index to Appendix	12

CITATIONS

	Page
Breslin v. State, 189 Misc. 547, 72 N. Y. S. (2d) 63 (1947)	6
C. I. R. v. Duberstein, (1960) 363 U. S. 278	4
Carney v. Buyea, 271 App. Div. 338, 65 N. Y. S. (2d) 902 (1946)	8
Corbin v. City of Philadelphia, 195 Pa. St. 461, 45 Atl. 1070 (1900)	6
Easterlin v. Green, 248 S. C. 389, 150 S. E. (2d) 473 (1966)	5
Galloway v. U. S. (1943) 319 U. S. 372	5
Jowers v. Dupriest, 249 S. C. 506, 154 S. E. (2d) 922 (1967)	4
Maryland Steel Co. v. Marney, 88 Md. 482, 42 Atl. 60 (1898)	6
McAlister v. U. S., (1954) 348 U. S. 19	4
Porter v. Cook, 196 S. C. 433, 138 S. E. (2d) 486	6
Rogers v. Florence Printing Company, 233 S. C. 567, 106 S. E. (2d) 258 (1934)	8
Sarratt v. Holston Quarry Co. of S. C., 174 S. C. 262, 177 S. E. 135 (1934)	6
Youn v. Baldridge, 243 S. C. 458, 134 S. E. (2d) 258 (1958)	8
United States v. United States Gypsum Co., (1948) 333 U. S. 364	4
Zenith Radio Corp. v. Hazeltine Research, Inc., (1969) 395 U. S. 100	4

OTHER REFERENCES

	PAGE
158 A. L. R. 190	8
4 A. L. R. 3d 558	6
35 Am. Jur. 2d., *Fires*, pg. 614	6
C. F. R., Title 29, Labor-Parts 1900-1919, Rev. July 1, 1975, Subpart H, sec. 1910 at pages 165, 172, 175	7-8
Federal Rules of Civil Procedure, Rule 52(a)	2, 4
28 U. S. C. 1254	2
Restatement of the Law of Torts, Vol. 2, Sec. 472	6
Wright & Miller, Vol. 9, Federal Practice and Procedure	4
Chapt. 7, section 2587, pg. 740, et seq.	4, 5
Chapt. 7, section 2590, pg. 760	5
49 Va. L. Rev. 506 (April 1963)	5

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No. .....

BRUCE K. JORDAN, PETITIONER,

versus

U. S. NATURAL RESOURCES, INC.,
IRVINGTON MOORE DIVISION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on October 5, 1977.

OPINIONS BELOW

The opinion of the District Court (App. 13) is not reported. The order of the District Court denying petitioner's motion for an amendment to and supplemental findings of fact and conclusions of law (App. 25) is not reported. The opinion of the Court of Appeals (App. 27) is not yet reported. The opinion of the Court of Appeals denying the petition for rehearing and suggestion for rehearing *en banc* (App. 39) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on the 5th day of October, 1977 (App. 27). Petition for rehearing and suggestion for rehearing *en banc* (App. 31) was denied on the 7th day of November, 1977 (App. 39). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Does the standard of federal appellate review of findings by a District Judge in actions tried without a jury under Rule 52(a) of the Federal Rules of Civil Procedure compel that such findings be given the same binding force and effect as is required to be given to a jury verdict, particularly where the findings are based upon undisputed and uncontroverted evidence?

2. Whether in actions tried without a jury a Court of Appeals is bound by the findings of a District Judge made pursuant to Rule 52(a) of the Federal Rules of Civil Procedure that it is contributory negligence for a person to go to the rescue of another who wrongfully creates the situation necessitating the rescue where such findings and conclusions are without evidentiary support or, at the least, the entire evidence of record is productive of a definite and firm conviction that a mistake has been committed?

STATUTE INVOLVED

Rule 52(a) of the Federal Rules Civil Procedure,

"In all actions tried upon the facts without a jury . . . the court shall find the facts specially. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to judge of the credibility of the witnesses."

STATEMENT

Petitioner brought suit against respondent corporation to recover damages for severe burns and serious permanent injuries sustained in going to the rescue of persons, including respondent's agent, working in a building where a bucket of gasoline was caused to be ignited and burst into flames by reason of the alleged negligence, recklessness and wantonness of respondent's agent.

The case was tried on May 12, 1975 before the District Judge without a jury. On December 16, 1975, he issued his Findings of Fact, Conclusions of Law and Order directing entry of judgment for respondent, based upon his conclusion that petitioner was contributorily negligent * in undertaking to rescue persons, including respondent's agent, by removing from the premises where they were at work the blazing bucket of gasoline which was in close proximity to tanks and rubber hoses containing flammable gases of acetylene and oxygen (App. 13). Petitioner filed a timely motion to amend and supplement the findings of fact, conclusions of law and order for judgment (App. 19) which was denied by Order of the District Judge, dated January 26, 1976 (App. 25).

Upon appeal, the Court below, after detailing the uncontroverted facts giving rise to this action, concluded that since this case was tried without a jury it can no more reverse the District Judge's findings than could an appellate court disturb the jury's resolution of the similar question in a state court. Also, nowhere in its otherwise detailed opinion did the court discuss or pass upon the question as to respondent's recklessness and wantonness which was briefed and argued in the appeal below. The Court, there-

* Implicit from the District Judge's finding of contributory negligence is that respondent was negligent in causing the blaze. The District Judge made no finding as to the alleged recklessness and wantonness of the respondent, as to which contributory negligence is not a bar to recovery in South Carolina.

fore, affirmed the judgment of the District Court (App. 30). Petition for rehearing and suggestion for rehearing *en banc* was filed, requesting, at the least, that the Court below pass upon the question presented in the appeal below as to the recklessness and wantonness of respondent as to which contributory negligence is not a bar to recovery in South Carolina. *Jowers v. Dupriest*, 249 S. C. 506, 154 S. E. (2d) 922 (1967). The petition was denied by the Court below on November 7, 1977 (App. 39).

REASONS FOR GRANTING THE WRIT

1. **The decision herein is not in accord with the applicable decisions of this Court**:—The decision in the Court below is in direct conflict with the holding by this Court enunciated in *United States v. United States Gypsum Co.* (1948), 333 U. S. 364, 395 that in actions tried without a jury "judicial review of findings of trial courts does not have the constitutional limitations of findings . . . by a jury" and are "never conclusive"; and "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

2. **Existing conflict among the Circuits and also among the courts within specific circuits**:—Notwithstanding the decisions of this Court construing the scope of federal review of findings made pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, *United States v. United States Gypsum Co.* (1948), 333 U. S. 364 *Zenith Radio Corp. v. Hazeltine Research, Inc.* (1969), 395 U. S. 100, *CIR v. Duberstein* (1960), 363 U. S. 278, *McAlister v. U. S.* (1954), 348 U. S. 19, there is a conflict not only among the circuits but also within specific circuits as to the scope of review as pointed out by the author in Vol. 9, *Wright and Miller, Federal Practice and Procedure*, Chapter 7, Section 2587, page 740 *et seq.* and particularly when a finding of negligence is involved, Vol. 9, *Wright and Miller, Federal Practice and Procedure*, Chapter 7, section 2590, page 760. To the same effect, see *Note, Rule 52(a): Appellate Review of Findings of Fact based on Documentary or Undisputed Evidence*, 49 Va. L. Rev. 506 (April, 1963).

The allowance of the petition in the case at bar would afford this Court the opportunity to resolve the prevalent confusion and conflicts among the circuits and among the courts within specific circuits on an important question of appellate review and would be conducive to the fair and efficient administration of justice.

3. **The action of the Court below, in affirming the findings and judgment of the District Court, is inconsistent with applicable principles of federal appellate review and contrary to the applicable state law involving an important question affecting the loss of human life which otherwise may be saved.**

The action of the Court below, in refusing to disturb the finding of the District Judge that petitioner was contributorily negligent in going to the rescue of respondent's agent and others, is in direct conflict with the holding of this Court that where a party having the affirmative of an issue has the occasion and opportunity to produce evidence on such issue, but the evidence thereon is legally insufficient to support the burden of the party's proof, such issue should be withdrawn from the consideration of the fact finder. *Galloway v. United States*, 319 U. S. 372 (1943).

In South Carolina, like in most other jurisdictions, contributory negligence is an affirmative defense and the burden is on the defendant to make out such defense by the greater weight or preponderance of the evidence. *Easterlin v. Green*, 248 S. C. 389, 150 S. E. (2d) 473 (1966).

In accordance with the Sudden Emergency Doctrine in South Carolina, *Porter v. Cook,* 196 S. C. 433, 138 S. E. (2d) 486, coupled with the Rescue Doctrine as enunciated in Vol. 2, Restatement of the Law of Torts, section 472, 35 Am. Jur. (2d), *Fires,* sec. 34, p. 614 and 4 A. L. R. (3d) 558, followed in South Carolina, *Sarratt v. Holston Quarry Co. of S. C.,* 174 S. C. 262, 177 S. E. 135 (1934), which stems from the high regard that the law has for human life, *Maryland Steel Co. v. Marney,* 88 Md. 482, 42 Atl. 60 (1898), the declared "law of the land", based upon "conscience and reason" and "the best judgment of thoughtful and intelligent judges" approving rather than condemning the bravery of a rescuer, *Corbin v. City of Philadelphia,* 195 Pa. St. 461, 468-469, 45 Atl. 1070 (1900), and the universal rejection of the cowardly proposition that a rescuer upon perceiving the danger should run away and leave those in danger to the consequences thereof, *Breslin v. State,* 189 Misc. 547, 72 N. Y. S. (2d) 63 (1947), petitioner respectfully submits that the finding of contributory negligence in the case at bar is totally without evidentiary support.

From the evidence of record and as appears from the opinions of the District Court and the Court below the following pertinent facts are undisputed and uncontroverted: (1) respondent's agent allowed or caused to be brought into a building where he and other men were working with an acetylene torch on a platform or catwalk above the ground an open bucket of gasoline, (2) that to the knowledge of respondent's agent the bucket of gasoline was placed in close proximity to tanks containing hazardous gases of acetylene and oxygen supplying through attached rubber hoses fuel to the acetylene torch throwing off sparks while in use by respondent's agent, (3) that a spark fell into the bucket igniting the gasoline which burst into flames, (4) that at the time there were several men, including respondent's agent, working on the catwalk, (5) that one of the men upon seeing the blaze and afraid of the fire ran out of the building (Reporter's Transcript, pp. 52, l 1; App. to appellant's brief in Court below, p. 37, l 22), (6) that respondent's agent, working on the catwalk engaged in cutting steel by means of the acetylene torch, with his eyes probably shielded, was oblivious to the fire (Reporter's Transcript, p. 172, ll 1-19; App. to appellant's brief in Court below, p. 103, ll 1-19), (7) that petitioner entered the building at the time the gasoline burst into flames, and upon being confronted with the blaze and the men working on the catwalk, and reasonably believing that they were in danger (Reporter's Transcript, pp. 104-107; App. to appellant's brief in Court below, pp. 67-70), grabbed the nearest means at hand—a stick which he ran through the handle of the bucket, lifted it and started out of the building, and (8) that petitioner, as he neared the entrance of the building, his vision obscured by the flames, stumbled, overturning the bucket with the result that the fire spilled over him causing severe burns and permanent injuries.

From the foregoing undisputed facts, it is apparent that there was not one iota of evidence that petitioner was guilty of contributory negligence or, at the least, the entire evidence is productive of the definite and firm conviction that a mistake has been committed in finding petitioner guilty of contributory negligence in going to the rescue of respondent's agent and others. This is so, notwithstanding the District Judge's process of reasoning that petitioner was not engaged in a rescue since the men on the catwalk were not in danger because they were not calling for his assistance. The fallacy of this reasoning is clearly evident when it is considered (1) that it is common knowledge and recognized that acetylene and oxygen are hazardous gases, particularly when in close proximity to flames, Title 29-

Labor-Parts 1900-1919 of CFR, rev. July 1, 1975, Subpart H, sec. 1910 at pages 165, 172, 175, (2) that one of the men on the catwalk upon seeing the burst of flames immediately ran out of the building, (3) that respondent's agent, working with an acetylene torch cutting steel with his eyes shielded, was oblivious to the fire, and (4) that calling for assistance is not a prerequisite for allowing recovery to a rescuer, particularly where the person rescued or sought to be rescued is not aware of the danger, *Carney v. Buyea,* 271 App. Div. 338, 65 N. Y. S. (2d) 902 (1946). In addition, as stated in 158 A. L. R. 190, 193, even though the course which the rescuer takes, when viewed in retrospect as was viewed by the District Judge here, may have proved unnecessary, it cannot affect the rights of the rescuer or constitute contributory negligence.

Moreover, the Court below did not discuss or pass upon the question presented whether the respondent was guilty of recklessness or wantonness as to which contributory negligence does not bar a recovery. In this connection, since the record is undisputed that respondent's agent **consciously** caused the bucket of gasoline to be brought into the premises, and, with knowledge that it was placed in close proximity to rubber hoses carrying hazardous gases of acetylene and oxygen, engaged in cutting steel by the use of an acetylene torch which emitted sparks, igniting the bucket of gasoline, it is clear that he was guilty of recklessness and wantonness as a matter of law in accordance with the definition and meaning of recklessness as articulated by the South Carolina Supreme Court in *Youn v. Baldridge,* 243 S. C. 458, 134 S. E. (2d) 248 (1964) and *Rogers v. Florence Printing Company,* 233 S. C. 567, 106 S. E. (2d) 258 (1958). Thus assuming, *arguendo,* that petitioner was guilty of contributory negligence, it did not bar a recovery against respondent.

The issue raised under this heading involves an important question of state law as to conduct affecting the loss of human life which otherwise can be saved, was decided in a way in conflict with state law and universal reasoning, and involves an important question of federal appellate review as to which the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for for a Writ of Certiorari, should reverse the judgment of the Court below and remand the case with directions to order the District Court to assess damages in favor of petitioner.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

	PAGE
Findings of Fact, Conclusions of Law and Order	13
Judgment	18
Motion to Amend and Supplement Findings of Fact, Conclusions of Law and Judgment	19
Order of District Judge Denying Motion to Amend and Supplement Findings of Fact, Conclusions of Law and Judgment	25
Opinion of Court of Appeals	27
Petition for Rehearing and for Rehearing En Banc	31
Order of Court of Appeals Denying Petition for Rehearing and for Rehearing En Banc	39

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

BRUCE K. JORDAN, PLAINTIFF,

versus

U. S. NATURAL RESOURCES, INC.,
IRVINGTON MOORE DIVISION, DEFENDANT

Civil Action No. 74-922

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Filed December 16, 1975

This matter was tried before the Court without a jury and involves an action for personal injuries resulting from burns sustained by the plaintiff, which are allegedly due to the negligence of defendant's employee, who was supervising the repairing and updating of a kiln used by Boro Wood Products, Inc., the plaintiff's employer.

Having weighed all of the evidence and studied the applicable law, the Court makes the following:

Findings of Fact

1. The plaintiff is a citizen and resident of South Carolina and was 48 years of age at the time of his injury on January 14, 1972.

2. The defendant, U. S. Natural Resources, Inc., Irvington Moore Division, is a corporation organized and existing under the laws of a state other than South Carolina, but doing business within South Carolina.

3. That plaintiff was an employee of Boro Wood Products Co., Inc., hereinafter referred to as Boro, for a number of years prior to his injury. Boro uses a brick kiln, which is 25 feet wide, 125 feet long and 13 feet high, in processing wood used for the making of kitchen cabinets and other products. This kiln has a dirt floor.

4. That at some date prior to December 8, 1971, Boro suffered certain damage to its kiln and on December 8, 1971

Boro entered into a contract with the defendant to "repair and update" the kiln. This contract provided that the defendant would furnish a supervisor for the work at a cost of $100.00 per day and if Boro furnished at least six men to assist the supervisor, the work time should not exceed ten days.

5. That defendant sent its employee Orval Searcy to the Boro plant at Bennettsville, South Carolina to supervise the work under the contract, and a crew of seven Boro employees were assigned to him to help with the work. Plaintiff was a supervisor for Boro and he was to make sure that the seven Boro men worked for Searcy. Plaintiff was not to do any physical work for Searcy, but was to check on the Boro employees from time to time. This arrangement resulted from a labor union contract of Boro that prevented its employees from working under the supervision and direction of an outsider unless a Boro supervisor were present.

6. On or about January 14, 1972, it became necessary to clean certain babbits (bearing covers and bearings). These babbits may be cleaned by carbon tetrachloride or by gasoline. There is a dispute in the testimony as to whether Searcy asked an employee of Boro to get gasoline or carbon tetrachloride, but it is undisputed that the employee obtained gasoline and that Searcy knew that gasoline was being used in this cleaning process. There was approximately two and one-half gallons of gasoline in a five gallon bucket, which was brought into the kiln. This bucket was placed in close proximity to certain tanks containing oxygen and acetylene. Hoses extended from these tanks to a catwalk on which acetylene torches were being used and throwing off sparks.

7. One of these sparks ignited the fumes arising from the gasoline bucket and a fire resulted in the bucket of gasoline. The plaintiff came into the kiln at about the time the gasoline fire began. He stated that the hose of one of the oxygen tanks was only about six feet from the flame and he was afraid that the oxygen might catch fire, explode and kill him and the other employees. He ran a wooden stick, two or three feet in length, through the handle of the burning bucket, lifted the bucket and started out of the building with the fire. Unfortunately, he stumbled and fell causing the gasoline and fire to be spilled over him resulting in very serious burns over much of his body.

8. At the time plaintiff acted in an effort to remove the fire from the kiln he asserts that his actions were in an effort to protect the other employees from serious injury and the company's equipment from damage by fire. This anxiety was not shared by the other employees present. One employee, Malachi, testified when he saw the flame he was afraid and left his position on the catwalk, but admitted that he did not think anything would have happened if the flame and fire had been left where it was. The remaining Boro employees, who were present at the time of the fire, testified that the fire could have been easily distinguished by putting some type of lid or top on the gasoline bucket to cut off the supply of oxygen. The other employees did not think the fire created an immediate danger to persons or property.

9. The plaintiff was not engaged in a rescue of other employees when he attempted to remove the burning gasoline can, since the other employees were not in danger and were not calling for his assistance. He left a place of safety voluntarily and attempted to remove a five gallon bucket containing burning gasoline with only the use of a two to three foot stick, and he attempted to remove the bucket not just from the vicinity of the oxygen tank, which he contends created a hazard, but all the way out of the building.

10. In view of the conclusions of law, based upon the above Findings of Fact, it is not necessary to discuss damages.

CONCLUSIONS OF LAW

A. The Court has jurisdiction of the parties because of diversity of citizenship and the amount in controversy.

B. While it may have been negligent of the defendant's employee to allow the babbits to be cleaned in a gasoline solution rather than in carbon tetrachloride in close proximity to an acetylene torch and oxygen tanks, the Court finds that the plaintiff was guilty of contributory negligence in attempting to remove the burning five gallon bucket by use of only a short stick. Plaintiff's actions were unreasonable under the circumstances and he assumed any risk in connection therewith. The contributory negligence of the plaintiff combined and concurred with any such negligence on the part of the defendant as a proximate cause of his injuries and without which they would not have resulted and, therefore, the plaintiff may not recover.

C. Plaintiff contends that any unreasonable act on his part results from his effort to rescue his fellow servants or to protect the property of his employer, and that under the "Rescue Doctrine" his actions were not negligent. This "Rescue Doctrine" is enunciated in the case of *Sarratt v. Holston*, 174 S. C. 262, 177 S. E. 135 (1934). Sarratt had gone to the rescue of a fellow employee who "**lay prostrate**, in the grasp of the electric current and heavy voltage that surrounded the said metal shed and nearby pole, with which were connected the uninsulated wires heavily charged with electricity, **wailing** and **crying for help** . . . ." (Emphasis added). The Court stated:

> "It is the position of appellants that, when the intestate went to the rescue of Mr. Champion, he assumed or incurred the risk incident thereto. In this connection we may state that ordinarily a person going to the rescue of another person in danger has no higher right of protection, under the law, than the person he goes to protect or rescue. While under the general rule this is true, the action of the person who goes to the rescue of one in peril and danger must be viewed in the light of the conditions and circumstances surrounding him at the time he acts. One going to the rescue of a person in pain and suffering and apparent danger of immediately losing his life does not, if he is a normal person, take time to think out and deliberately plan the safest way to protect himself from danger in carrying out the purpose of his act; that is, to rescue a person in danger. All that is required of him, under the law, is to act and do as an average, normal person would situated under like circumstances."

Later the Court states:

> ". . . In answering the request and call to render assistance in rescuing Mr. Champion from his perilous position, the intestate could not be expected, and should not be expected, to go about such tasks with the deliberation and calmness that one would be expected to act under a case where no suffering existed and there was no apparent need of immediate action. He should simply be required to act as any normal person would likely act under similar situation and circumstances, trying to rescue a fellowman from apparent immediate danger."

Comparing Jordan's actions in the present case to those of Sarratt, it is obvious that the "Rescue Doctrine" which allowed recovery in *Sarratt* is not broad enough to cover Jordan. In the present case Jordan's fellow employees were not calling for help, none of them were helpless or had been injured in the fire, no equipment of the company had been ignited and the other people present were not unduly excited about the blaze. The plaintiff's contention that he was required to act immediately to remove the fire from the premises is not supported by the facts, particularly the actions or lack of action of the other employees present.

Based on the record in this case, the Court is compelled to find that the plaintiff was contributorily negligent in

bringing about his injuries and, therefore, he may not recover against defendant.

IT IS, THEREFORE, ORDERED that the Clerk enter judgment for the defendant.

AND IT IS SO ORDERED.

ROBERT F. CHAPMAN,
United States District Judge.

December 16th, 1975,
Columbia, South Carolina.

Civil Action No. 74-922

JUDGMENT

This action came on for trial before the Court, Honorable Robert F. Chapman, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that Plaintiff, Bruce K. Jordan, take nothing of Defendant, U. S. Natural Resources, Inc., Irvington Moore Division, and that the action be dismissed.

Dated at Columbia, South Carolina, this 16th day of December, 1975.

MILLER C. FOSTER, JR.,
Clerk of Court.
By: /s/ LINDA N. RICHARDSON,
Deputy Clerk.

Civil Action No. 74-922

MOTION TO AMEND AND SUPPLEMENT FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The plaintiff above named moves the Court to amend and supplement its findings of fact, conclusions of law and judgment heretofore filed, in the following particulars:

1. Amend Finding of Fact No. 7 to read as follows:

One of these sparks ignited the fumes arising from the gasoline bucket and a fire resulted in the bucket of gasoline emitting flames therefrom. The plaintiff came into the kiln at the time the gasoline fire began; and confronted with the sudden emergency and reasonably apprehensive of the peril and danger to the lives of the persons working in the kiln on the catwalk, some of whom apparently did not recognize the danger, and seeing that Searcy, defendant's employee, and the other workers were moving along the catwalk and dragging the hoses leading from the acetylene torch to the oxygen tanks closer to the flames, and fearful that the flames would sever the hoses causing the kiln to fill up with oxygen from the escaping valves and cause either an explosion or conflagration of the fire to the peril of those on the catwalk, plaintiff immediately picked up a wooden stick, two or three feet in length, which he found nearby, ran it through the handle of the bucket, lifted the bucket and started out of the building with the burning gasoline in the bucket. While so removing the flaming bucket, plaintiff stumbled and fell causing the gasoline and fire to be spilled over him resulting in very serious burns over much of his body.

2. Amend Finding of Fact No. 8 to read as follows:

At the time plaintiff was confronted with the sudden burst of flames from the burning bucket of gasoline while Searcy and other workers were moving the hoses leading from the oxygen tanks up to the catwalk closer to the flames, and acted in an effort to remove the flaming bucket, he asserts and reasonably believed that the persons working on the catwalk were in peril

or danger of loss of life or serious bodily injury, particularly since some of them were in a position where they might not have been able to recognize the danger and were in the process of moving along the catwalk bringing the hoses leading from the tanks to the acetylene torch on the catwalk closer to the flames; and the plaintiff's actions were an effort to protect or rescue such persons from the apparent peril or danger to their lives and to protect the equipment from the danger of damage or destruction by fire.

3. Amend Finding of Fact No. 9 to read as follows:

The plaintiff was engaged in the protection or rescue of the persons working in the kiln from the apparent imminent danger or peril of loss of lives or serious bodily injuries and the protection of the equipment from the danger of destruction or damage by fire when he attempted to remove the flaming bucket of burning gasoline from the premises, and at the time was acting in a sudden emergency created by the actions and conduct of defendant's employee in using an acetylene torch to cut metal which caused sparks to be emitted and ignite the fumes from the bucket of gasoline in close proximity to the hoses leading from the tanks on the floor of the kiln to the catwalk above.

4. Amend Finding of Fact No. 10 to read as follows:

In view of the conclusions of law based upon the above findings of fact, the plaintiff is entitled to a recovery against the defendant for the injuries and damages sustained by him.

5. Make the following additional findings of fact:

The defendant, by and through its agent and employee working on the catwalk within the course and scope of defendant's employment, used an acetylene torch on metal causing sparks to fly which resulted in a fire when a spark struck the fumes of the gasoline in the bucket notwithstanding that defendant's employee knew that the bucket contained gasoline which was in close proximity thereto and that the emission of the sparks would likely result in the ignition of the fumes

of the gasoline and create a condition dangerous to the safety and lives of the persons working in the premises and to the equipment therein.

6. Consistently with the findings of fact as so amended and supplemented, the conclusions of law be amended to state in addition to paragraph A, and in lieu of paragraphs B and C, the following:

The defendant, by and through its agent and employee acting within the course and scope of employment, was negligent, reckless and wanton in using an acetylene torch on metal emitting sparks which struck the fumes of the gasoline and caused it to ignite when said defendant's employee knew that the bucket of gasoline was in close proximity thereto and that the use of the acetylene torch on metal would emit sparks and likely result in the ignition of the fumes from the gasoline, dangerous to the safety and lives of the persons working in the premises and to the equipment therein.

The negligence, recklessness and wantonness of the defendant by and through its employee acting within the course and scope of his employment was a proximate cause of the fire and resulting injuries and damages to the plaintiff.

The plaintiff, upon suddenly being confronted with a flaming bucket of burning gasoline in his employer's building in close proximity to rubber hoses leading from an oxygen tank on the floor of the kiln to an acetylene torch on the catwalk above and reasonably believing that the persons working in said building were in danger of loss of lives or serious bodily injuries and that the equipment therein was in danger of destruction or damage by fire, acted as a reasonably prudent person would have acted under the same or similar circumstances and was not contributorily negligent, reckless or wanton in attempting to protect or rescue the workers and the equipment therein from the danger by acting to remove the burning bucket of gasoline from the premises.

"As summarized by The Restatement of the Law of Torts, Vol. 2, Sec. 472, 'it is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the land or chattels of himself or a third person from harm.'" *Breslin v. State,* 189 Misc. 547, 72 N. Y. Supp. 2d 62 (1947).

In the cited case, wherein the facts are similar to those in the present case, the Court held that it was not contributory negligence for a plaintiff to expose himself to danger by assisting and removing a blazing barrel from a storage room. In holding that contributory negligence could not defeat a recovery in such circumstances and discussing the "Rescue Doctrine" which is equally applicable to the facts in the present case, the Court stated:

> "Danger invites rescue . . . . The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effect within the range of natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer."

The "Rescue Doctrine" is followed in South Carolina. In *Sarratt v. Holston,* 174 S. C. 262, 177 S. E. 135 (1934), the Court stated:

> ". . . The action of the person who goes to the rescue of one in peril and danger must be viewed in the light of the conditions and circumstances surrounding him at the time he acts. One going to the rescue of a person . . . in apparent danger of immediately losing his life does not, if he is a normal person, take time to think out and deliberately plan the safest way to protect himself from danger in carrying out the purpose of his act; that is, to rescue a person in danger. All that is required of him, under the law, is to act and do as the normal person would under like circumstances."

Also applicable to the present case is the "Sudden Emergency Doctrine" stated in *Porter v. Cook,* 196 S. C. 433, 13 S. E. 2d 486 (1941), wherein the Court held that one is not guilty of negligence if he is "suddenly placed in an emergency and compelled to act instantly and makes a choice as a person of ordinary prudence placed in such a position might make, even though he does not make the wisest choice." The Court therein stated as follows:

> "Persons who have to act in the face of sudden and imminent peril, are not to be judged in the light of later events, but are to be judged under all the circumstances which surround them at the time, by the standard of what a person of ordinary prudence would have been likely to do under the same conditions."

The "Rescue Doctrine" and the "Sudden Emergency Doctrine" extend to the facts in the instant case. The blazing bucket of gasoline presented to the ordinary reasonable person suddenly confronted with it a potential danger to both life and property. Immediate action was necessary. The action taken by plaintiff in the sudden emergency to rescue the persons whom he reasonably believed were in danger was natural and reasonably calculated to eliminate the danger. Under such circumstances, I cannot find contributory negligence on the part of the plaintiff.

Based on the record in this case the plaintiff is entitled to recover against the defendant damages in such amount as will fairly compensate him for his injuries and damages sustained.

IT IS, THEREFORE, ORDERED that the Clerk enter judgment for the plaintiff against the defendant for such amount of damages as the Court will hereafter determine and order.

7. Consistently with the findings of fact and conclusions of law as so amended and supplemented, the judgment be amended as follows:

> IT IS ORDERED AND ADJUDGED that the plaintiff, Bruce K. Jordan, recover from the defendant, U. S. Natural Resources, Inc., Irvington Moore Division, such damages as the Court may hereafter determine and order.

This motion is based upon the grounds that the undisputed facts clearly manifest that the defendant by and through its employee was negligent, reckless and wanton in causing the fire and resulting damages to the plaintiff by using an acetylene torch on metal which emitted sparks to fly in close proximity to the bucket of gasoline located near hoses leading from oxygen tanks on the floor of the kiln to the acetylene torch on the catwalk; that the aforesaid negligence, recklessness and wantonness proximately caused the fire and resulting injuries and damages to the plaintiff; and that the plaintiff acted as a reasonably prudent person would have acted under the same or similar circumstances and was not contributorily negligent and reckless in attempting to remove the bucket of gasoline from his employer's premises in order to rescue or protect the persons working therein from the danger of loss of life or serious bodily injuries and to protect equipment from the danger of destruction or damage by fire.

JOHN C. LINDSAY,
Bennettsville, South Carolina,

HENRY HAMMER,
Columbia, South Carolina,
Attorneys for Plaintiff.

Columbia, South Carolina,
December 23, 1975.

CERTIFICATE

I, Henry Hammer, one of the attorneys for plaintiff in the above entitled action, hereby certify that on the 23rd day of December, 1975, I served the foregoing Motion upon Saunders M. Bridges, Esquire, attorney for defendant, by depositing a copy of same in the U. S. mails, post-paid, addressed to him at 318 West Palmetto Street, Florence, South Carolina, 29501.

HENRY HAMMER.

December 23, 1975.

Civil Action No. 74-922

ORDER

This matter is before the Court upon motion of the plaintiff for an amendment to and supplemental Findings of Fact and Conclusions of Law. The effect of the plaintiff's motion, if granted, would be to completely change the basic Findings of Fact and Conclusions of Law on the issue of liability. The Court has weighed the evidence carefully in this case and finds that the evidence supports the original Findings of Fact and the Conclusions of Law. No good cause has been shown as to why these should be amended or supplemented.

IT IS, THEREFORE, ORDERED that the motion be and the same is hereby denied.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN,
United States District Judge.

January 26th, 1976,
Florence, South Carolina.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-1303

BRUCE K. JORDAN, APPELLANT,

versus

U. S. NATURAL RESOURCES, INC.,
IRVINGTON MOORE DIVISION, APPELLEE

Appeal from the United States District Court for the District of South Carolina, at Florence. Robert F. Chapman, District Judge.

Argued: April 5, 1977. Decided October 5, 1977.

Before CLARK, Supreme Court Justice,* HAYNSWORTH, Chief Judge, and RUSSELL, Circuit Judge.

John C. Lindsay and Henry Hammer for Appellant; Saunders M. Bridges, Jr. and Saunders M. Bridges for Appellee.

PER CURIAM:

The plaintiff sued to recover for injuries sustained while attempting to remove an ignited gasoline bucket from an enclosed kiln in which work by a number of persons was in process. Tried without a jury, the District Judge made findings of fact and conclusions of law, under which he granted judgment for the defendant.

*** Sitting by designation. Justice Clark died before the opinion was prepared.**

The facts giving rise to this action are as follows: The plaintiff was employed as a foreman by the Boro Wood Products, Inc. The manufacturing operations of Boro Wood Products were conducted in a kiln which was about 25 feet wide, 125 feet long, and 13 feet high from the dirt floor to a catwalk, on which there was standing room for a man between the catwalk and the ceiling of the building. The catwalk was reached by a ladder located at the front of the kiln.

Some time before plaintiff's accident, Boro entered into a contract with the defendant incident to the repair and modernization of the kiln. Under the contract the defendant was to furnish the materials used in the work and a supervisor to direct the actual work. Boro, however, was to furnish employees to assist the supervisor in the performance of the work. The defendant assigned its employee Searcy to supervise the work. Union rules, however, required Boro to furnish a supervisor for its own employees and the plaintiff was assigned by Boro to perform this task.

At the time of plaintiff's accident, some employees were engaged in cleaning metal bearings with gasoline. There were approximately two and one-half gallons of gasoline in a five gallon bucket, which had been brought into the kiln with Searcy's knowledge. The bucket was situated near certain tanks containing oxygen and acetylene. Hoses extended from these tanks up to the catwalk where they connected with and supplied fuel for the acetylene torches being used by Searcy in cleaning some metal. In his use of the torches, Searcy was progressing from the front to the rear of the kiln. As he reached a point on the catwalk where he was largely overhead the gasoline bucket, a spark from the torch fell into the gasoline bucket and ignited it. The bucket burst into flame. The plaintiff entered the kiln at about this time, saw the burning bucket, cried "fire," and rushed to the front of the kiln to get a short stick he had apparently seen there. He ran this stick through the handle of the bucket, lifted it and started out of the building with it. As he neared the entrance of the kiln, his vision was obscured by the flames from the gasoline, he stumbled, overturning

the bucket, with the result that the gasoline and fire spilled over him causing the injuries for which he sought damages.

It was plaintiff's contention that Searcy, as defendant's agent, was guilty of negligence in permitting the gasoline to be placed in dangerous proximity to the acetylene tank while he was working with an acetylene torch on the catwalk overhead. The defendant countered with pleas of assumption of risk and contributory negligence. It seems to have been agreed that the dispositive issue in the case was whether the plaintiff's right to recover was defeated by his own contributory negligence. The plaintiff contended that, in resolving that issue, the district court in this diversity action was controlled by the South Carolina decision of *Sarratt v. Holston Quarry Co. of S. C.* (1934), 174 S. C. 262, 177 S. E. 135.

Sarratt established the principle that, in determining whether a plaintiff who "goes to the rescue of one in peril and danger" on account of the negligence of the defendant, was guilty of contributory negligence, his conduct is to be measured by what "the average normal person" would do "situated under like circumstances," 174 S. C. at 279, or, as Justice Cordozo phrased it in the classic rescue case relied on by the Court in *Sarratt, Wagner v. International Ry Co.* (1921), 232 N. Y. 176, 133 N. E. 437, 438, 19 A. L. R. 1, by a "reason fitted and proportioned to the time and the event." In *Sarratt,* the defendant had installed uninsulated electric lines of a high voltage leading down to a shed in the quarry. The night of the accident was "marked by damp and inclement weather." As a result of the faulty wiring and lack of insulation in the heavy voltage line to the shed, the shed had become dangerously electrified. When the night watchman at the quarry attempted, in the course of his duties, to enter the shed, he was knocked down by an electric charge and "lay prostrate, in the grasp of the electric current and heavy voltage," in fear for his life. 174 S. C. 267-8 and 277. His "cries and wails, caused by his agony and suffering, could be heard for some distance." 174 S. C. at 277. Whether the action of the plaintiff, in answering the night watchman's cry of distress under these circum-

stances was contributory negligence was held by the Court to be a question for the jury.

Unquestionably the facts in this case are no more compelling for the plaintiff than were the facts in *Sarratt*. In fact, the district judge found that they were much weaker and we are inclined to agree with him. In *Sarratt*, there was every indication that the watchman was in dire peril for his life and that he could be saved by the action in which plaintiff was engaged at the time he met his death. There certainly was not the same obviousness of danger to human life in this case and the district judge made a finding to this effect is distinguishing *Sarratt*. Further, in *Sarratt* the watchman was sending out the most agonizing cries for rescue. Nothing like this was present in this case. The district judge found here that none of the persons in the kiln were "calling for help, none of them were helpless or had been injured in the fire, no equipment of the company had been ignited and the other people present were not unduly excited about the blaze." The District Court, also, found that there was no immediate danger requiring prompt action on the part of the plaintiff.

If the facts in *Sarratt* were sufficient only to make the issue of contributory negligence on the part of the plaintiff one for the jury, the plaintiff can claim no greater right in this case. But, since this case was tried without a jury, that issue was to be resolved, not by the jury, but by the district judge. The district judge did resolve it and we can no more reverse his findings than could an appellate court disturb the jury's resolution of the similar question in *Sarratt*.

Judgment affirmed.

PETITION FOR REHEARING OR ALTERNATIVELY FOR REHEARING EN BANC

United States Court of Appeals

FOR THE FOURTH CIRCUIT

Case No. 76-1303

BRUCE K. JORDAN, APPELLANT,

versus

U. S. NATURAL RESOURCES, INC.,
IRVINGTON MOORE DIVISION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FROM THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

PETITION FOR REHEARING

The appellant, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully petitions this Court for a rehearing of its decision of October 5, 1977, affirming the judgment of the District Court, for the following reasons:

I

This Court, in stating in its opinion that "it was plaintiff's contention that Searcy, as defendant's agent, was guilty of negligence in permitting the gasoline to be placed in dangerous proximity to the acetylene tank while he was working with an acetylene torch on the catwalk overhead" and that "it seems to have been agreed that the dispositive issue in the case was whether the plaintiff's right to recover was defeated by his own contributory negligence," apparently misapprehended or overlooked one of plaintiff's main

contentions, as appears from (1) the Complaint, (2) Motion to Amend Findings, and (3) Brief of Appellant, that the only reasonable conclusion to be drawn from the evidence was that defendant's agent was guilty not only of negligence but also of recklessness, and that contributory negligence is not a defense to recklessness in accordance with the law of South Carolina.

II

This Court, in affirming the judgment of the District Court, misapprehended the effect of the uncontroverted facts, overlooking that there was not one iota of evidence to support a finding that plaintiff was guilty of contributory negligence in going to the rescue of defendant's agent and others by removing from the premises an open bucket of gasoline in close proximity to rubber hoses carrying highly inflammable and hazardous gases of oxygen and acetylene ignited by the fault of defendant's agent, creating a situation which plaintiff believed to be dangerous to the life and limb of defendant's agent and others working in the premises; and that the only reasonable conclusion deducible from the uncontroverted facts is that the plaintiff's course of conduct, acting from the "most unselfish motives" and "prompted by the noblest impulses" in going to the rescue of others was that of a normal and reasonably prudent person.

III

This Court, in affirming the finding of the District Court that there was no immediate danger requiring prompt action on the part of the plaintiff, apparently overlooked that the District Judge must have reached such finding by viewing the evidence in retrospect and not in light of what the plaintiff must necessarily have believed in the haste and confusion of the moment. Such view of the evidence is contrary to the principle that what the average normal person would do in going to the rescue of one believed to be in peril or danger must be viewed in the light of what that person "must necessarily have believed in the haste and confusion of the moment. . . . For the law measures acts done under the spur and stress of sudden emergencies . . . when done for the purpose of averting serious or even fatal consequences to others, with more indulgence than where they are impelled by no such motive." *Wilmer v. Rittenhouse* (CA 4, 1954), 209 F. (2d) 554. Such persons "are not to be judged in the light of later events," *Porter v. Cook*, 196 S. C. 433, 13 S. E. (2d) 486 (1941), nor is the conduct of such persons to be viewed in retrospect, and when so viewed, even though the course which the rescuer took may have proved unnecessary, it cannot constitute contributory negligence. 158 A. L. R. 190, 193. As stated in *Sarratt v. Holston Quarry Co. of S. C.* (1934), 174 S. C. 262, 177 S. E. 135, "One going to the rescue of a person . . . does not, if he is a normal person, take time to think out and deliberately plan the safest way to protect himself from danger in carrying out the purpose of his act; that is, to rescue a person in danger."

IV

This Court, in affirming the judgment of the District Court, held that "we can no more reverse his findings [the District Judge's] than could an appellate court disturb the jury's resolution of the similar question in *Sarratt*." In so holding, this Court apparently overlooked or misapprehended the standard of appellate review applicable in reviewing a district court's findings of fact*, particularly where, as here, the findings and conclusions of the District Court were based upon uncontroverted material facts.

---

* The applicable standard of review is clearly stated in *Daniel H. Tuttle v. American Oil Co.*, 292 F. (2d) 123 (CA 4, 1961), quoting from *McAllister v. United States*, 1954, 348 U. S. 19, 20, 75 S. Ct. 6, 99 L. Ed. 20, as follows:

". . . A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

and in *Western Oil Co. v. Hodger Co.* (CCA 5, 1955), 218 F. (2d) 158, 161, as follows:

". . . This Court has held, in conformity with this rule, that it may reverse '(1) Where the findings are without substantial evidence to support them; (2) Where the Court misapprehended the effect of the evidence; and (3) if, though there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.'"

V

This Court, in affirming the reasoning of the District Court that plaintiff was guilty of contributory negligence because "none of the persons in the kiln were 'calling for help, none of them were helpless or had been injured in the fire, no equipment of the company had been ignited and the other persons were not duly excited about the blaze' ", overlooked the uncontroverted evidence that one of the persons, upon seeing the blaze, was afraid of the fire, which "looked like it would get me, so I figured I would get out of there," the defendant's agent was oblivious to the fire as he was working on the catwalk overhead cutting steel with an acetylene torch, and none of the persons were helpless or had been injured in the fire because of the prompt action of the plaintiff in removing the blazing bucket before it could do any damage or harm.

PETITION FOR REHEARING EN BANC

The appellant, in the alternative, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, respectfully petitions this Court for a rehearing *en banc* of its decision of October 5, 1977 in the above entitled case for the reasons set forth above and for the following additional reasons:

I

Due to the death of Mr. Justice Clark after hearing oral argument as a member of the three-judge panel and before the opinion was prepared, appellant was deprived of the right and benefit of having his case fully considered and determined by a panel of three judges of this Court, particularly in light of the fact that nowhere in the opinion does there appear any discussion or treatment of one of the main questions raised by appellant of whether defendant's agent was guilty of recklessness.

II

The two-judge panel of this Court, in holding that it can no more reverse the finding of the District Court than could an appellate court disturb the jury's resolution of a similar question, apparently applied a standard of appellate review of a district judge's findings, particularly where, as here, it is based upon uncontroverted facts, in conflict with the standard of review enunciated by the United States Supreme Court in *McAllister v. United States* (1954), 348 U. S. 19, and heretofore applied by this Court, *Daniel H. Tuttle v. American Oil Co.* (CA 4, 1961), 292 F. (2d) 123 and *MacMullen v. S. C. Electric and Gas Co.*, 312 F. (2d) 662 (CA 4, 1963).

The allowance of this petition will afford all judges of this Court the opportunity to resolve the conflict and secure or maintain uniformity of its decisions.

III

With all due deference to the District Judge, the underlying rationale and philosophy of his decision critical of and condemning the plaintiff by holding him guilty of contributory negligence for his conduct in going to the rescue of persons, including the defendant's agent, who was guilty of creating a situation which the plaintiff reasonably believed placed such persons in danger of life or serious bodily harm, offends the traditional notions of justice and the high regard that society and the law hold for human life, as is expressed by the courts with such poignancy in *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 Atl. 60 (1898), as follows:

> " 'The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons.' . . . In *Linnehan v. Sampson*, 126 Mass. 506, where the court said: 'The law does not require cowardice or inaction in such a state of things, and it does not follow, as a matter of law, that in encountering the danger he was necessarily guilty of a want of due and reasonable care.' . . . The plaintiff in this case, though moving in

> a humble sphere, has given an example of genuine and heroic manhood, and has demonstrated that in his estimation 'the duties of life are more than life.' ";

in *Corbin v. City of Philadelphia,* 195 Pa. St. 461, 468, 469, 45 A. 1070 (1900), as follows:

> " 'A rescuer, one who, from the most unselfish motives, prompted by the noblest impulses that can impel man to deeds of heroism, faces deadly peril, ought not to hear from the law words of condemnation of his bravery, because he rushed into danger, to snatch from it the life of a fellow creature, imperilled by the negligence of another; but he should rather listen to words of approval, unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence. This conscience and reason approve, and the best judgment of thoughtful and intelligent judges has declared it to be the law of the land.' ";

and in *Breslin v. State,* 189 Misc. 547, 72 N. Y. S. (2d) 63 (1947), involving a factually similar situation, as follows:

> "It seems to us that the State is in effect saying that the claimant, upon perceiving the danger, should forthwith have run away, leaving the instructor to shift for himself with the blazing barrel as best he might, whatever the consequence to him or the school building. We do not propose to countenance any such cowardly proposition, and do not believe it to represent the law. The boy, whatever his previous and subsequent record, did the natural and manly thing in attempting to help. Had the joint endeavor been successful, undoubtedly he would have been commended for his quick thinking and bravery. But the barrel tipped over, so, instead, he is guilty of contributory negligence."

The true effect of the rationale and philosophy of the District Judge would be to discourage traditional notions of bravery exercised by persons acting "from the most unselfish motives" and "prompted by the noblest impulses" from going to the rescue of others who may otherwise suffer death or serious bodily harm. This is so, particularly

when the rescue may not be successful and the course of the rescuer's conduct is viewed in retrospect, and when so viewed, may have proved unnecessary.

The allowance of this petition for rehearing *en banc* would afford all judges of this Court the opportunity to review and resolve the problems herein on an important question affecting the loss of human life which otherwise may be saved.

CONCLUSION

For all of the reasons set forth above and those in the Brief of Appellant heretofore filed, it is respectfully urged that a hearing be granted under Rule 40 of the Federal Rules of Appellate Procedure, or, in the alternative, a rehearing *en banc* be granted under Rule 35 of the Federal Rules of Appellate Procedure, and that upon such hearing the judgment of the District Court be reversed and the cause be remanded to the District Court with directions to assess damages in favor of plaintiff.

Respectfully submitted,

/s/ JOHN C. LINDSAY,
Bennettsville, South Carolina,

/s/ HENRY HAMMER,
Columbia, South Carolina,
Attorneys for Appellant.

October 12, 1977.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing Petition for Rehearing or Alternatively for Rehearing *En Banc* is presented and filed in good faith and not for delay.

/s/ JOHN C. LINDSAY,
Bennettsville, South Carolina,

/s/ HENRY HAMMER,
Columbia, South Carolina,
Attorneys for Appellant.

October 12, 1977.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-1303

BRUCE K. JORDAN, APPELLANT,

versus

U. S. NATURAL RESOURCES, INC.,
IRVINGTON MOORE DIVISION, APPELLEE

ORDER

Filed November 7, 1977

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing *en banc,* and no judge having requested a poll on the suggestion for rehearing *en banc,*

It is accordingly ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing *en banc* are denied.

Entered at the direction of Judge Russell with the concurrence of Chief Judge Haynsworth.

For the Court,
WILLIAM K. SLATE, II,
Clerk.

A True Copy, Teste:
WILLIAM K. SLATE, II, Clerk,

By FAYE L. SMITH,
Deputy Clerk.

Supreme Court, U. S.
FILED
JAN 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-
No. 907

BRUCE K. JORDAN, PETITIONER,

versus

U. S. NATURAL RESOURCES, INC.,
IRVINGTON MOORE DIVISION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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PAGE

Questions Presented 1

Statement 2

Argument:

I. The Decision Of The Court Below Is Not In Conflict With The Decisions Of This Court 4

II. There Is No Conflict Among The Circuits Or Among The Courts With Respect To Any Issue Pertinent To This Case 7

III. The Action Of The Court Below, In Affirming The Findings And Judgment Of The District Court, Is In Accord With Applicable Principles Of Appellate Review And The Applicable State Law 9

Conclusion 14

TABLE OF CASES

	Page
C.I.R. v. Duberstein, 363 U. S. 278 (1960)	8
Easterlin v. Green, 248 S. C. 389, 150 S. E. 2d 473 (1966)	11
Galloway v. United States, 319 U. S. 372 (1943)	11
Houston Oil Co. v. Goodrich, 245 U. S. 440 (1918)	9
McAllister v. United States, 348 U. S. 19 (1954)	8
Porter v. Cook, 196 S. C. 433, 13 S. E. 2d 486 (1941)	12
Rice v. Sioux City Memorial Park Cemetery, 349 U. S. 70 (1955)	8
Rudolph v. United States, 370 U. S. 269 (1962)	9
Sarratt v. Holston Quarry Co. of S. C., 174 S. C. 262, 177 S. E. 135 (1934)	3, 5, 12
Southern Power Co. v. North Carolina Public Service Company, 263 U. S. 508 (1924)	9
United States v. Singer Mfg. Co., 374 U. S. 174 (1963)	8
United States v. United States Gypsum Co., 333 U. S. 364 (1948)	4, 5, 8
Yaun v. Baldridge, 243 S. C. 414, 134 S. E. 2d 248 (1964)	12
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U. S. 100 (1969)	6

OTHER REFERENCES

Revised Rules of the Supreme Court of the United States, Rule 19	8
Federal Rules of Civil Procedure, Rule 52(a)	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 907

BRUCE K. JORDAN, PETITIONER,

versus

U. S. NATURAL RESOURCES, INC.,
IRVINGTON MOORE DIVISION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

Respondent respectfully submits that the Questions Presented herein should be stated as follows:

1. Whether the United States Court of Appeals for the Fourth Circuit by its opinion below departed from the proper standard of appellate review of findings by a District Judge in an action tried without a jury under Rule 52(a) of the Federal Rules of Civil Procedure?

2. Whether the findings and conclusions of the District Judge that petitioner was not engaged in a rescue of others at the time of the incident concerned and was barred from

recovery by reason of contributory negligence are without evidentiary support or the entire evidence of record productive of a definite and firm conviction that a mistake has been committed thereby?

STATEMENT

Petitioner brought suit against respondent in the United States District Court for the District of South Carolina, with jurisdiction based on diversity of citizenship and amount in controversy, to recover damages for personal injuries received when he stumbled and fell while attempting to carry a bucket of burning gasoline by means of a short stick which he had run through the bucket handle from a building where men were working. The bucket had been ignited by a spark from an acetylene torch being used in connection with work activities on a catwalk in the building. Petitioner alleged that the fire was caused by the negligence, recklessness and wantonness of respondent's agent and asserted that his actions in attempting to carry the bucket from the building concerned (a kiln) were in an effort to protect the other employees from serious injury.

The case was tried on May 12, 1975, before the District Judge without a jury. Considerable testimony was presented with respect to the circumstances existing at the time of the incident and bearing upon the question of whether the burning bucket of gasoline constituted any real threat or danger to other persons or to property and the question of the reasonableness of petitioner's asserted belief that the burning bucket of gasoline constituted an immediate danger of serious harm to other employees, necessitating their rescue.

On December 16, 1975, the District Judge issued his Findings of Fact, Conclusions of Law and Order directing entry of judgment for respondent (Petition App. pp. 13-18). The District Judge concluded that the respondent's

employee "may have been negligent" (Petition App. p. 16). However, he concluded further that the petitioner was guilty of contributory negligence in attempting to remove the burning bucket by use of only a short stick; that the petitioner's actions were unreasonable under the circumstances and he assumed any risk in connection therewith; and that the petitioner's contributory negligence barred him from recovery (Petition App. p. 16).

The District Judge found that the petitioner was not engaged in a rescue of other employees when he attempted to remove the burning bucket since the other employees were not in danger and were not calling for his assistance (Petition App. p. 15). He found further that the petitioner left a place of safety voluntarily and attempted to remove the five gallon bucket with only a two to three foot stick and attempted to remove the bucket not just from the vicinity of an oxygen tank which petitioner contended created a hazard, but all the way out of the building (Petition App. p. 15).

In connection with the petitioner's contentions regarding the necessity of rescue, the District Judge made additional findings that the petitioner's asserted anxiety was not shared by the other employees present and that they did not think the fire created an immediate danger to persons or property (Petition App. p. 15). The District Judge concluded that the "Rescue Doctrine" as applied in the South Carolina decision of *Sarratt v. Holston Quarry Co. of S. C.*, 174 S. C. 262, 177 S. E. 135 (1934), was not broad enough to cover petitioner.

Petitioner filed a timely Motion to Amend and Supplement the Findings of Fact, Conclusions of Law and Judgment (Petition App. pp. 19-24) seeking adoption by the District Judge of the conclusion that the fire and resulting injuries to the petitioner were caused by negligence, reck-

lessness, and wantonness of the respondent. That Motion was denied by the District Judge by his Order dated January 26, 1976 (Petition App. p. 25).

Upon appeal, the Court below reviewed the evidence and the findings of the District Judge, with particular reference to the contentions of the parties regarding the application of the "Rescue Doctrine" and affirmed the findings and judgment of the District Court resolving the issue of contributory negligence in favor of the respondent and its operation as a bar to recovery by the petitioner (Petition App. pp. 27-30).

Petitioner thereafter filed a Petition for Rehearing or Alternatively for Rehearing *En Banc* asserting, *inter alia,* that the Court of Appeals apparently misapprehended or overlooked petitioner's contention that the only reasonable conclusion to be drawn from the evidence was that respondent's agent was guilty not only of negligence but also of recklessness and that contributory negligence is not a defense to recklessness in accordance with the law of South Carolina (Petition App. pp. 31-37). That petition was denied by the Court below on November 7, 1977 (Petition App. p. 39).

ARGUMENT

I

The Decision Of The Court Below Is Not In Conflict With The Decisions Of This Court.

Petitioner's contention that the decision of the Court below is in conflict with the holding by this Court in *United States v. United States Gypsum Co.,* 333 U. S. 364 (1948), with respect to the standard of appellate review of findings in actions tried without a jury is without merit. When the opinion of the Court below is considered as a whole, it is apparent that the Court below followed the proper standard of review as set forth in *United States v. United States Gypsum Co.,* 333 U. S. 364 (1948), for determining whether findings are clearly erroneous. The Court of Appeals reviewed the evidence and determined that it raised issues of fact which under the evidence were properly resolved by the District Judge.

The Court of Appeals' independent evaluation of the evidence for substance and sufficiency is plainly evidenced by the Court's discussion of the factual issue regarding the reasonableness of the petitioner's conduct in the light of the "Rescue Doctrine" as applied by the South Carolina Supreme Court in *Sarratt v. Holston Quarry Co. of S. C.,* 174 S. C. 262, 177 S. E. 135 (1934). The Court of Appeals observed that the District Judge found that the facts in this case were much weaker than the facts in *Sarratt* and stated "we are inclined to agree with him" (Petition App. p. 30). In distinguishing the *Sarratt* case, the Court of Appeals stated: "There certainly was not the same obviousness of danger to human life in this case." (Petition App. p. 30). In further distinguishing that case with reference to the factual circumstance there existing of calls for help, the Court of Appeals noted: "Nothing like this was present in this case" (Petition App. p. 30).

It is therefore apparent that the Court of Appeals was not blindly accepting the District Judge's findings. It is further apparent that the Court of Appeals was not left with a "definite and firm conviction" that a mistake had been committed. Although the Court of Appeals did not specifically discuss the "clearly erroneous" rule, the decision is clearly in accord with the requirements of that rule as enunciated by this Court in *United States v. United States Gypsum Co.,* 333 U. S. 364, 395 (1948).

The statement by the Court below at the conclusion of its opinion that the District Judge had resolved the issue of contributory negligence and "we can no more reverse

his findings than could an appellate court disturb the jury's resolution of the similar question in *Sarratt*" (Petition App. p. 30) must be taken in the context of the previous language of the opinion which discloses a consideration of the evidence and underlying factual findings bearing upon the issue of contributory negligence. The quoted statement does not constitute an expression by the Court that it was restricting its review within the limitations applicable to review of the findings of a jury or giving the findngs a "conclusive" effect. The Court below compared the facts in the *Sarratt* case with the evidence in the present case and the quoted statement at the conclusion of its opinion amounts to no more than an expression of the Court's legitimate conclusion that the evidence was sufficient in this case to warrant resolution of the issue of contributory negligence by the District Judge. The Court of Appeals cannot be faulted for giving due deference to the District Judge's resolution of that issue. As stated by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969):

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. . . ."

II

There Is No Conflict Among The Circuits Or Among The Courts With Respect To Any Issue Pertinent To This Case.

The petitioner's contention that this Court should grant *certiorari* in this case by reason of the existence of a conflict among the circuits and among the courts within specific circuits as to the scope of appellate review of findings of fact based on inferences from undisputed facts and in negligence cases is also without merit.

The existence of any conflict among the circuits or among the courts within specific circuits in connection with the scope of appellate review of findings of fact based on inferences from undisputed facts has no relevance to the situation presented in the instant case. A crucial factual issue in this case underlying the ultimate issue of contributory negligence was the applicability of the "Rescue Doctrine" to the actions of the petitioner. In that connection, the facts of rescue and reasonableness of the petitioner's asserted belief that there was immediate danger to others necessitating the plaintiff's action were highly disputed. It was petitioner's contention that he acted in apprehension of immediate peril and danger to the lives of other persons. Petitioner testified that he moved the gas because he was scared it would get in a nearby oxygen tank and "blow the men up" (Reporter's Transcript, p. 68 Joint Appendix in Court below, p. 105). The respondent, on the other hand, presented considerable testimony as to numerous circumstances contradicting that there was a rescue involved and the reasonableness of petitioner's asserted belief of immediate danger of serious injury to others as reflected in the findings of the District Judge and the opinion of the Court below.

It is therefore apparent that any supposed conflict regarding the scope of appellate review of findings of fact based on inferences from undisputed facts presents a question of purely academic interest insofar as this case is concerned. This Court has declared in Rule 19 of its Revised Rules that its discretionary power of review upon writ of *certiorari* will be exercised only when there are "special and important" reasons therefor. As stated by this Court in *Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70, 74 (1955):

> ". . . 'Special and important reasons' imply a reach to a problem beyond the academic or episodic. . . ."

In any event, this Court has already expressly determined and stated that the "clearly erroneous" rule applies to "inferences drawn from documents or undisputed facts" [*United States v. United States Gypsum Co.*, 333 U. S. 364 (1948); *United States v. Singer Mfg. Co.*, 374 U. S. 174 (1963)] and to "factual inferences from undisputed basic facts" [*C. I. R. v. Duberstein*, 363 U. S. 278 (1960)]. Further, the holding of this Court in *McAllister v. United States*, 348 U. S. 19 (1954), plainly determined that a finding of negligence is reviewed under the "clearly erroneous" rule. Any continued conflict among the circuits or among the courts within specific circuits as to whether the "clearly erroneous" rule applies to review of such findings is simply unjustified. This Court should not be called upon to grant a writ of *certiorari* in this case merely to repeat the position it has taken in the past and from which it has never departed, particularly where, as here, the opinion of the Court below is in accord with the "clearly erroneous" standard as defined by this Court.

III

The Action Of The Court Below, In Affirming The Findings And Judgment Of The District Court, Is In Accord With Applicable Principles Of Appellate Review And The Applicable State Law.

We submit that none of the matters asserted by petitioner under the heading of the third reason advanced in his Petition for granting the writ presents any valid reason why this Court should grant *certiorari* in this case.

Petitioner's arguments pursue a course which would require this Court's analysis of the evidence for sufficiency. What the petitioner seeks by his Petition is to have this Court review the facts and evidence in this case and reverse the decision of the Court below by holding that the findings of the District Court were clearly erroneous and that the petitioner is entitled to judgment on the issue of liability as a matter of law. Respondent submits that this Court should not be called upon to exercise its discretion to grant a writ of *certiorari* for that purpose in this case, a diversity suit involving no question of special importance beyond the interests of the parties to the action. It has long been the declared policy of this Court not to grant a writ of *certiorari* for the purpose of reviewing evidence and questions of fact [*Southern Power Co. v. North Carolina Public Service Company*, 263 U. S. 508 (1924); *Houston Oil Co. v. Goodrich*, 245 U. S. 440 (1918)], or matters of no importance save to the litigants themselves [*Rudolph v. United States*, 370 U. S. 269 (1962)].

Moreover, the petitioner's argument with respect to the sufficiency of the evidence to support the District Judge's findings is patently unsound.

Petitioner argues that because of certain portions of the evidence selected by petitioner the "Sudden Emergency Doctrine" coupled with the "Rescue Doctrine" operated to

prevent a finding of contributory negligence and rendered that finding "without evidentiary support", or that the entire evidence is productive of the definite and firm conviction that a mistake has been committed in finding petitioner guilty of contributory negligence.

The fallacy of petitioner's argument is apparent from petitioner's erroneous characterization of all the evidence to which he refers as "undisputed facts" and the omission of any proper consideration of the considerable contradictory evidence introduced at the trial. Perhaps the most salient example of this basic error in petitioner's approach to the matter is the petitioner's assertion that it is an "undisputed" and "uncontroverted" fact that petitioner acted in attempting to carry the burning bucket "reasonably believing" that the men on the catwalk were in danger (Petition, pp. 6, 7).

The reasonableness of petitioner's asserted belief in a threat of immediate danger to the men working on the catwalk was clearly not an undisputed or uncontroverted fact. It was one of the basic disputed issues of fact in the case. Evidence contradicting the asserted reasonableness of such belief included, *inter alia*: (1) That no one was around the flaming bucket (Reporter's Transcript, p. 102, Joint Appendix in Court below, p. 65); (2) that the catwalk on which the men were working was twelve or thirteen feet above the ground (Reporter's Transcript, pp. 21, 53; Joint Appendix in Court below, pp. 17, 38); (3) that the floor of the building where the bucket was located when it ignited was a dirt floor (Reporter's Transcript, p. 23; Joint Appendix in Court below, p. 19); (4) that the bucket was about eight feet from the tanks containing oxygen and acetylene (Reporter's Transcript, p. 40; Joint Appendix in Court below, p. 25) and at least five or six feet from the hoses connecting the torch to the tanks (Reporter's Transcript, p. 103; Joint Appendix in Court below, p. 66); (5) that the tanks containing oxygen and acetylene would not have been harmed by heat unless subjected to heat of 500 to 600 degrees (Reporter's Transcript, p. 164; Joint Appendix in Court below, p. 97); (6) that one of the employees present at the time of the fire stayed at his workstation on the catwalk ladder and that the fire did not even excite him (Reporter's Transcript, pp. 63, 64; Joint Appendix in Court below, pp. 48, 49); (7) that another employee left the area because he was afraid of fire and was the closest to it, but was not concerned about explosion (Reporter's Transcript, pp. 54, 57; Joint Appendix in Court below, pp. 39, 42); and (8) that both of said employees assumed that the gasoline would have simply burned itself out if left alone (Reporter's Transcript, pp. 54, 55, 65; Joint Appendix in Court below, pp. 39, 40, 50). In addition, the evidence did not disclose that there were calls for assistance by anyone, that any of the persons present were injured or incapacitated, or that any equipment had been ignited.

There is nothing in this case contrary to the principles applied in *Galloway v. United States*, 319 U. S. 372 (1943), or *Easterlin v. Green*, 248 S. C. 389, 150 S. E. 2d 473 (1966), cited by petitioner. This case does not involve any reliance by respondent on speculation or the withholding of available evidence within the peculiar knowledge of respondent as referred to in *Galloway* or failure on the part of respondent to meet its burden of proof on the issue of contributory negligence.

It cannot be seriously questioned that petitioner's conduct without any justifiable excuse would constitute negligence. Petitioner asserted the application of the "Sudden Emergency Doctrine" and "Rescue Doctrine" to justify his conduct. Resolution of the factual issues concerned in the question of the application of those doctrines in respondent's favor supported respondent's case.

It could clearly be found by a preponderance of the evidence considered in its entirety that there was no "apparent immediate danger" as described in *Sarratt v. Holston Quarry Co. of S. C.*, 174 S. C. 262, 177 S. E. 135 (1934), or "sudden and imminent peril" as described in *Porter v. Cook*, 196 S. C. 433, 13 S. E. 2d 486 (1941), or reasonable belief in the existence of such a danger or peril on the part of petitioner, and that petitioner was contributorily negligent in taking the action he did. Furthermore, even if it should be assumed, *arguendo*, that there was such a danger or peril which reasonably prompted petitioner's action at the outset, it could clearly be found by a preponderance of the evidence that petitioner was contributorily negligent in any event by continuing to carry the flaming bucket with his vision becoming increasingly obscured by means of only a short stick far beyond the zone of the danger from which petitioner himself relied to justify his action. (Reporter's Transcript, p. 106; Joint Appendix in Court below p. 69). His negligence increased with every step he took.

Petitioner further asserts that the Court below did not decide or pass upon the question of whether the respondent was guilty of recklessness or wantonness as to which contributory negligence does not bar a recovery and that the evidence establishes as a matter of law that respondent's agent (Searcy) was guilty of recklessness.

It is noted in this connection that the same contention was presented to the Court below by petitioner's Petition for Rehearing which the Court below denied. In addition, the evidence clearly does not support a finding of recklessness on the part of respondent's agent as a matter of law. Recklessness is defined in *Yaun v. Baldridge*, 243 S. C. 414, 134 S. E. 2d 248 (1964), cited by petitioner, as follows:

> "'Recklessness implies the doing of a negligent act knowingly. When a man actually acts negligently and he realizes that he is acting negligently, the law says that he is reckless or wilful and wanton, whichever term you prefer, they all mean the same thing, that is, conscious failure to exercise due care.'"

There is no evidence to indicate a knowledge on Mr. Searcy's part of any likelihood that sparks from the acetylene torch used on the catwalk could reach the bucket of gasoline. In addition, Mr. Searcy had instructed employees who had been working with the gasoline to cover the bucket when they had finished (Reporter's Transcript, pp. 178-179; Joint Appendix in Court below, pp. 109-110). When Searcy was using the torch just prior to the outbreak of the fire, he thought that the employees had finished using the gasoline bucket, and that it would have been covered (Reporter's Transcript, p. 179; Joint Appendix in Court below, p. 110). It also appears from the Petition that the petitioner contends that the person placed most in jeopardy by the situation which existed was Searcy. It is illogical to assume that Searcy would have consciously placed himself in a position of jeopardy. The petitioner plainly did not prove the conscious failure to exercise due care required to compel a finding of recklessness as a matter of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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January 18, 1978.